to the benefit of the state, and where the action may be prosecuted independently of the state authorities, and in which the rules of civil rather than criminal law prevail, and where everything indicates that the principal purpose of the act was to provide for those dependent upon the dead man, is to be construed to be penal because it *incidentally* punishes the wrongdoer, such a construction is most technical. It is based on form rather than substance and has little to commend it. The decision in the New Hampshire Court is sound and should be followed.

CONTRIBUTORY NEGLIGENCE AS MATTER OF LAW.

In the recent case of *Hatch v. Lake Shore & M. S. Ry. Co.*, decided by the Appellate Division of the Supreme Court of New York, there was some conflict in the evidence relating to the care exercised by the deceased.[1] The following facts, however, were undisputed:

The plaintiff's intestate, Hatch, together with the principal witness, Nelson, started to cross a grade crossing on defendant's line about 1:30 A. M. The gates were lowered, according to the defendant's case, before the two had gone upon the tracks; according to the plaintiff's case, however, Hatch and Nelson were already upon the first siding, and inside the gates when they were lowered, but were still in a place of safety. At least four more tracks, therefore, were now before them; first, another siding, then the west bound and east bound tracks of the main line, in the order named, and finally, still another siding. A freight train was approaching along the further, or east bound track. They waited until the caboose had almost reached the crossing, and then started on. Nelson testified that at this point they both looked eastward along the nearer track, where the Twentieth Century Limited was now approaching, but saw nothing of it. There was evidence, controverted by the defendant, tending to show that the headlight of this train was dim or entirely extinguished, and that there was no warning bell or whistle. Plaintiff's intestate was killed by the express on the near track, as he stepped ahead to pass behind the freight. On this evidence, the questions of negligence on the part of defendant and contributory negligence on the part of Hatch having both been left to the

[1] 145 N. Y. Supp., 781.

jury, they twice returned a verdict for the plaintiff, and the Appellate Division of the Supreme Court twice reversed the judgments entered on these verdicts, on the ground that the trial Court had refused to charge that a pedestrian who proceeds to cross a track after the gates are down, whether they are lowered before he starts, or while he is inside but still in a place of safety, is guilty of contributory negligence as a matter of law.

It is obvious that the Appellate Division desired to lay down an inflexible standard of reasonable human conduct. It may be worth while to inquire whether it was justified in so doing, on grounds either of authority or of reason. Mr. Wigmore, in his "Treatise on Evidence," lays down three eceptions to the general doctrine that the question of negligence is one of fact for the jury.[2]

1. A concrete rule of law, statute or common, may have been laid down, declaring certain acts, the dangerous consequences of which are well known, to be negligent *per se*. One does them at his peril. So a city ordinance might declare, or a Court might decide, that one who left his horse unhitched in a city street should be liable for the consequences at all events.

2. In every case, the Court must decide whether there is sufficient evidence to go to the jury, so this question forms an exception as a matter of course.

3. In cases where "the facts are undisputed, and fair-minded or reasonable men could draw but one inference from them," Courts, using these exact words, have often held that the consideration of negligence may be withdrawn from the jury.

Mr. Wigmore's first and third exceptions are also stated in somewhat different words in Cyc., and his second of course goes without saying.[3] If we examine his propositions closely, it appears that the concrete rule of law mentioned in the first exception must necessarily be the result, either of legislation, with which we are not dealing here, or of the repeated exercise, in numerous similar situations, of the discretion which his third exception allows the Court. That is, another inflexible standard of reasonable human conduct has been embedded in the law. We may therefore confine ourselves to the second and third exceptions. As Mr. Wigmore points out, the form of words used in the third is often only another way of expressing the idea con-

[2] Vol. 4, sec. 2552.

[3] 29 Cyc., 645 (tit. Negilgence).

tained in the second. But equally often it means much more. Many Courts, in applying this rule, have not confined themselves to passing on the sufficiency of the evidence, but have gone further, and constituted themselves judges of the fact; that is, of the inferences and conclusions to be drawn from the evidence. There are plenty of instances of similar encroachments on the province of the jury, some of which will be mentioned later. Before we inquire whether this particular invasion is justifiable or not, it will be desirable to examine a few cases, taken at random from among the numerous decisions on this point, which illustrate the distinction drawn above. In none of these cases are the facts on all fours with the principal case, but their tendency is fairly obvious.

In California it has been held, in accord with the principal case, that the act of a plaintiff in driving across the track when he knew the train was very near, was contributory negligence *per se*.[4] Yet the Court says:

"If one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another that he had not, * * * * it must be left to the jury." From this it seems possible that they may have intended to pass merely on the sufficiency of the evidence. The Supreme Court of the United States, in deciding the other way on a state of facts somewhat similar to those in the principal case, uses practically the same expression:

"If fair-minded men will honestly draw different conclusions from the same undisputed facts, then it is for the jury."[5]

The Illinois case of *Terre Haute & R. R. R. Co. v. Voelkner* is directly in conflict with the principal case, as far as the spirit of the opinion is concerned.[6] It is there held that it cannot safely be laid as a rule of law that one who goes upon a railroad track without looking or listening for approaching trains, is guilty of contributory negligence. Part of the opinion is well worth quoting:

"It is doubtless a rule of law that a person approaching a railway crossing is bound, in so doing, to exercise such care, caution and circumspection to foresee danger and avoid injury as ordinary prudence would require, having in view all the known dangers of the situation, but precisely what such requirements would

[4] *Herbert v. R. R. Co.*, 121 Cal., 227.

[5] *Richmond & D. R.R. Co. v. Powers*, 149 U. S., 43.

[6] 129 Ill., 540.

be, must manifestly differ with the every-varying circumstances under which such approach may be made."

It is interesting to find two decisions of the highest Court of New York, which also cast some doubt on the holding of the principal case. In the case of *Holbrook v. Utica etc R. R. Co.*, where there was some evience that the plaintiff's elbow was projecting outside the window of the car when the injury occurred, the judge simply told the jury that if they found it as a fact they might infer negligence from it.[7] And in the case of *Stackus v. N. Y. C. & H. R. R. C.*, it was held that plaintiff's failure to lower his buggy top at the railroad crossing was not negligence *per se*.[8] The Court uses language very similar to that quoted above in the Illinois case:

"It is well settled that a person approaching a railroad crossing must exercise care and caution such as a prudent person would exercise to avoid danger. Whether such care has been exercised in a given case, is usually a question of fact for the jury, to be determined from all the circumstances of the case."

Other cases in substantial conflict with the principal case, where the Court has limited itself to passing on the sufficiency of the evidence, are to be found in Texas,[9] Iowa,[10] Maine,[11] Nebraska,[12] and Wisconsin.[13]

Other cases in substantial accord with the principal case where the Court has attempted to lay down an inflexible standard of reasonable human conduct, are to be found in Indiana,[14] and Pennsylvania.[15] Thus we find the issue squarely framed, and the authorities in direct conflict. Ought the Courts of their own motion to pick out certain acts and say that whoever does these shall be negligent?

As a question of reason pure and simple, it is obvious that the answer to it must depend on two considerations; first, what things are for the Court, in general, and what things for the jury; second, what manner of thing is negligence, and to which of these

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[7] 12 N. Y., 236.

[8] 79 N. Y., 464.

[9] *T. & P. Ry. Co. v. Chapman*, 57 Texas, 75.

[10] *Lavarenz v. C., R. I. & P. R. R. Co.*, 56 Iowa, 689.

[11] *Plummer v. Eastern R. R. Co.*, 73 Me., 591.

[12] *Spears v. Chi., B. & Q. R. R. Co.*, 43 Neb., 720.

[13] *Morrison v. Madison*, 96 Wis., 452.

[14] *Young v. Citizens' Street R. R. Co.*, 148 Ind., 54.

[15] *Boyle v. Mahoney City*, 187 Pa., 1.

two classes does it belong? Professor Thayer, in his essay on "Law and Fact in Jury Trials," gives a clear-cut answer to the first problem.[16] He says that the jury have come to be the judges of a limited class of "ultimate facts," that is, facts which they must derive from the evidence by reasoning, inference, and judgment. Even here, however, they are subject to the supervision of the judges, who must pass upon the sufficiency of the evidence. In a case of negligence, as the writer points out, this would mean only that the Court had a right to determine whether the conduct of the jury was reasonable in deciding whether the conduct of a third party was reasonable. It is true that Courts have always retained, and have even assumed from time to time, jurisdiction over many matters of ultimate fact. But the wisdom of these retentions and assumptions has been at least debatable. For example, the Courts have always reserved to themselves the interpretation of written instruments, and have laid down rigid rules, whereby the intention of the maker has often been defeated, although his meaning would have been as clear as crystal to twelve laymen. A still more glaring instance is found in the definition of "legal insanity" laid down in MacNaghten's Case, where it was held that insanity is an excuse for crime only where the prisoner is mentally incapable of understanding the nature of his act and its moral turpitude.[17] The test was adopted universally, and is still widely followed in this country under the name of "right and wrong" test. Yet it obviously does not cover many cases of medical insanity, where the prisoner is not morally guilty. The New Hampshire case of *State v. Jones* pointed out this injustice, and charged the jury generally that they were to acquit the prisoner if they found that his act was the product of mental disease.[18] These cases clearly show the danger of laying down an inflexible definition or rule of law in matters involving complex facts an infinite variety of circumstance.

And it is equally clear that negligence, as well as insanity, is such a matter, for it involves an average of human prudence under an infinite variety of circumstance. It hardly seems wise for one man to attempt to strike this average, even for a given set of facts, but when he, or any number of men, go further, and say that the average which they have struck under these present facts

[16] 4 *Harv. Law Rev.*, 147.

[17] 10 Clark & F., 200.

[18] 50 N. H., 369.

shall apply to all future facts which are more or less similar, then indeed we have an unprecedented invasion of the province of the jury. For these reasons, it would seem that the line of decisions, of which the principal case is one of the latest, represent a dangerous tendency, and are wrong on principle.

A MUNICIPALITY AS A PUBLIC UTILITY.

The Supreme Court of Wisconsin, two justices dissenting, recently held that the City of Menasha, having a population of nearly six thousand, which in addition to lighting its streets, public buildings, etc., with its own plant, merely furnished lights for about two years to the mayor and the mayor's partner, and for a few days to a third party, was not a public utility. It was the intention of the city when erecting its plant to light the whole town, but its plant proved wholly insufficient to do commercial lighting other than that mentioned, and for over three years prior to the commencement of the action in the case under discussion it failed to furnish any light except for its own purposes. The action was instituted for the purpose of restraining the city from furnishing light to its citizens after the enlargement of its plant subsequent to the passage of a statute requiring a municipality to obtain the approval of the Board of Railroad Commissioners before entering into competition with an existing public utility.[1]

The Court stated in arriving at the above conclusion: "The furnishing of a few lights to one store and one residence for a short time we do not think made the city a public utility under the doctrine of *Cawker v. Meyer*.[2] However this might be, the city had ceased to perform any function as a public utility for more than three years before the passage of the * * * * act." The dissenting opinion takes issue with these statements, saying: "It is uncontroverted that the defendant city took all the legal steps necessary to establish its right and power to build a lighting plant to supply the city and the inhabitants thereof with light * * * * I think the city lost no rights which it had acquired * * * * by delaying to extend its activities to commercial lighting * * * * It did not if a city has the same

[1] *Wisconsin Traction, Light, Heat & Power Co. v. City of Menasha*, 145 N. W. Rep., 231.

[2] 147 Wis., 320.